The Constitution in Crisis:

With 26 Laws Implicated by Administration Misconduct, It's Long Past Time for Real Checks and Balances

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The Supreme Court's recent landmark Supreme Court ruling in *Hamdan v. Rumsfeld* held that the President is subject to the requirements of both federal statutes and the Geneva Conventions in crafting rules for military tribunals. Though many progressives cheered the ruling as well as the Pentagons' statement that the Geneva Conventions would apply all detainees held abroad as restoring checks and balances, the unfortunate reality is we are a long way from being out of the constitutional woods under the dangerous combination of an imperial Bush presidency and a compliant GOP Congress.

I fear this for several reasons. The *Hamdan* decision itself was approved by only five Justices (three Justices dissented, and Chief Justice Roberts recused himself because he had previously ruled in favor of the Administration) and was written by 86-year old Justice Stevens. In the event of his retirement in the next two years, the Court's balance would likely be tipped back as he would undoubtedly be replaced by another Justice in the Scalia-Thomas-Roberts-Alito mode favoring an all-powerful "unitary"[1] executive. In the very first hearing held on the decision, the Administration witness testified that "the president is always right" and severely chastised the Court's decision. The Republican Majority also appears poised to use the decision to score political points rather than reassert Congressional prerogatives, as House Majority Leader Boehner disingenuously declared the case "offers a clear choice between Capitol Hill Democrats who celebrate offering special privileges to violent terrorists, and Republicans who want the President to have the necessary tools to prosecute and achieve victory in the Global War on Terror."[2]

Most significantly, this most recent instance of Administration overreaching to the point of unlawfulness is not an isolated occurrence. Rather, it is the latest example of an alarming pattern by which the Bush Administration has chosen to operate not only outside of the law, but without any meaningful oversight by Congress. I say this because I am in the process of finalizing a 370-page report detailing numerous instances of Administration misconduct associated with the Iraq War and National Security Agency surveillance in the United States. The Report – prepared by my House Judiciary Committee staff -- identifies substantial evidence that the President, the Vice-President and other high ranking members of the Bush Administration misled Congress and the American people regarding the decision to go to war in Iraq; misstated and manipulated intelligence information regarding the justification for such war; countenanced torture and cruel, inhuman and degrading treatment; permitted inappropriate retaliation against critics of the Administration; and approved unlawful domestic surveillance.

The misconduct I have found is not only serious, but widespread. The laws implicated by the Administration's actions include federal laws against making false statements to Congress; federal laws and international treaties prohibiting torture and cruel, inhuman, and degrading treatment; federal laws concerning retaliating against witnesses and other government employees; Executive Orders concerning leaking and other misuse of intelligence; federal regulations and ethical requirements governing conflicts of interest; the Foreign Intelligence Surveillance Act; communications privacy laws; the National Security Act; and the Fourth Amendment. All told, some 26 separate laws and regulations have been implicated by the actions of various individuals within the Bush Administration. Significantly, none of the misconduct I have identified has been independently reviewed by the Executive Branch, Congress, or the Courts.

It is for these reasons that notwithstanding the eloquence of the *Hamdan* decision, I believe our Constitution remains in crisis. We cannot count on a single judicial decision to reclaim the rule of law or resurrect the system of checks and balances envisioned by the founding fathers. Rather, we need to restore a vigilant Congress, an independent judiciary, a law-abiding president, and a vigorous free press that has served our Nation so well throughout the first 225 years of our history. What follows is a distillation of the findings in my Report.

Pre-War Deception and Manipulation

Considered in isolation, the various instances of pre-war falsehoods and misleading statements by the Bush Administration are worrisome. When analyzed in the aggregate, the evidence of persistent deception and outright manipulation associated with the run-up to the Iraq war is truly alarming and constitutionally dangerous.

First, we found that members of the Administration made numerous public statements to the effect that a decision had not been made to invade Iraq, when in fact the eventual public record indicates that such a decision had been made. Thus**, i**mmediately after the September 11 attacks, President Bush and high ranking officials in his Administration displayed an immediate inclination to blame Iraq – the President asked Richard Clarke to determine if Hussein is "linked in any way;"[3] White House officials instructed Wesley Clarke to state that the attack was "connected to Saddam Hussein;"[4] and Undersecretary of Defense Douglas Feith proposed that the U.S. select "a non al-Qaeda target like Iraq." [5] By March 2002, President Bush poked his head into the office of National Security Adviser Condoleezza Rice and declared "F*** Saddam. We're taking him out"[6] and *Time Magazine* reported that Vice President Cheney told a group of Senate Republicans, "[t]he question was no longer if the U.S. would attack Iraq … .The only question was when."[7] Four months later, when State Department Director of Policy Planning Richard Haass held a meeting with Ms. Rice and asked if they should discuss Iraq, she responded, "[d]on't bother. The president has made a decision."[8]

The Downing Street Minutes provide further unrebutted documentary evidence that in 2002, when President Bush was publicly stating that "I haven't made up my mind that we're going to war with Iraq,"[9] it was understood by the Blair government that the Bush Administration had irrevocably decided to invade Iraq. These documents reveal that President Bush had told Prime Minster Blair "when we have dealt with Afghanistan, we must come back to

Iraq"[10] (Fall, 2001); "Condi's enthusiasm for regime change is undimmed"[11] (March 14, 2002); the U.S. has "assumed regime change as a means of eliminating Iraq's WMD threat" [12](March 25, 2002); "Bush wanted to remove Saddam through military action, justified by the conjunction of terrorism and WMD"[13] and, most significantly, "the intelligence and facts were being fixed around the policy"[14] (July 23, 2002).

The Bush Administration's desire to go to war was so pronounced that they developed a "marketing" campaign by the Fall of 2002 (as then White House Chief of Staff Andrew Card explained, "from a marketing point of view … you don't introduce new products in August[15]) including the creation of the so-called "White House Iraq Group"[16] accompanied by the "rollout of speeches and documents;"[17] the coordinated leaking of classified information to support the case for war;[18] the release of a white paper inaccurately describing a "grave and gathering danger"[19] of Iraq's allegedly "reconstituted"[20] nuclear weapons program; the "introduction of the term 'mushroom cloud' into the debate;"[21]and the deliberate downplaying of the risks of occupation.[22] The plan by which the Bush and Blair Administration sought to use the UN to "wrongfoot Saddam on the inspectors and the UN SCRs [Security Council Resolutions]"[23] in the winter of 2002 and spring of 2003, constitutes further evidence that the decision to invade Iraq had been made. In addition, Defense Policy Board Member Richard Perle admitted the U.S. "would attack Iraq even if UN inspectors fail to find weapons;"[24] Vice President Cheney reportedly acknowledged to Hans Blix that the U.S. was "ready to discredit inspectors in favor of disarmament;"[25] and President Bush was "infuriated" by reports of Iraq's cooperating with UN inspectors.[26] It has also been reported that at a January 31, 2003, meeting with Prime Minister Blair, President Bush was so concerned by the failure to locate WMD that he proposed the U.S. "fly … UC reconnaissance aircraft planes with fighter cover over Iraq, painted in UN colours" and that "[i]f Saddam fired on them he would be in breach [of UN resolutions]."[27]

Second, we found that President Bush and members of his Administration made numerous false statements regarding linkages between Iraq and the September 11 attacks, such as Secretary Rumsfeld's September 22, 2002, claim that he had "bulletproof" evidence of ties between Saddam and al Qaeda.[28] With regard to general linkages between Iraq and al Qaeda, members of the Bush Administration ignored at least five separate reports from within their own Administration, including:

- a report shortly after September 11 prepared by Counterterrorism Coordinator Richard Clarke finding no connection with Iraq that was "bounced back," with his superiors saying "[w]rong answer ... . Do it again." [29]

- a September 21, 2001 classified intelligence briefing that "the U.S intelligence community had no evidence linking the Iraqi regime of Saddam Hussein to the attacks and that there was scant credible evidence that Iraq had any significant collaborative ties with Al Qaeda." [30]

- a June 21, 2002 CIA report which found "no conclusive evidence of cooperation [by Iraq] on specific terrorist operations." [31]

- an October 2002 National Intelligence Estimate which gave a "Low confidence" rating to the notion of "[w]hether in desperation Saddam would share chemical or biological weapons with Al Qaida." [32]

- a January 2003 CIA report that the "Intelligence Community has no credible information that Baghdad had foreknowledge of the 11 September attacks or any other al-Qaida strike." [33]

In terms of specific linkages, Vice President Cheney's December 9, 2001, statement that the meeting between Mohammed Atta and an Iraqi intelligence official in Prague had been "pretty well confirmed"[34] is contradicted by the fact that Czech government officials expressed doubts the meeting had occurred;[35] both the CIA and FBI concluded that "the meeting probably did not take place;"[36] and Administration records show that Mr. Atta was in Virginia Beach, Virginia at the time of the alleged meeting.[37] The Vice President's office appears to have placed undue pressure on the CIA to substantiate that this meeting did occur, with the Deputy Director of the CIA insisting to Mr. Libby, "I'm not going back to the well on this. We've done our work."[38]

In addition, statements by President Bush on October 7, 2002 that "Iraq has trained al Qaeda members in bomb-making and poisons and deadly gases;"[39] and Secretary Powell on February 5, 2003 "trac[ing] the story of a senior terrorist operative telling how Iraq provided training in these weapons to Al-Quaeda;"[40] with both saying this relationship goes back for "decades"[41] also were false. A declassified Defense Intelligence Agency report from February 2002 indicated that the source of this information, Ibn al-Shaykh al-Libi, "was intentionally misleading the debriefers in making these claims"[42] and that it was unlikely any relationship between Iraq and al Qaeda went back decades since "Saddam's regime is intensely secular and wary of Islamic revolutionary movements;"[43] a classified CIA report found that Mr. al-Libi was "not in a position to know if any training had taken place;"[44] and Administration officials knew or should have known he fabricated his statements to avoid torture.[45]

Third, we found that in making statements such as Mr. Cheney's March 16, 2003 declaration that "we believe [Saddam] has, in fact, reconstituted nuclear weapons,"[46] the Bush Administration ignored numerous intelligence reports that there was no credible evidence of an ongoing nuclear program in Iraq, including:

- a 1999 International Atomic Energy Agency report that there was "no indication that Iraq possesses nuclear weapons ... or any practical capability ... for the production of such material." [47]

- British intelligence officials' confirmation that Iraq's nuclear weapons program was "effectively frozen." [48]

- the pre-2002 CIA NIE indicating that Iraq did not have and was not trying to reacquire nuclear weapons. [49]

- the State Department INR's finding that it lacked "persuasive evidence that Baghdad has launched a coherent effort to reconstitute its nuclear weapons program." [50]

The Vice President's statement on August 26, 2002, that the Administration has learned about Hussein's efforts to reacquire nuclear weapons from "Saddam's own son-in-law,"[51] Hussein Kamel al-Majid, also appears to be knowingly or recklessly false. Not only was Kamel killed in February 1996, so he "could not have sourced what U.S. officials 'now know;'"[52] but his testimony to the IAEA was, according to *The Washington Post* "the reverse of Cheney's description" which was debriefed to U.S. officials.[53] President Bush's statement on September 7, 2002, that the IAEA had issued a new report that Iraq was "six months away from developing a [nuclear] weapon"[54] also was misleading, as *The Washington Post* found "there was no new IAEA report … Bush cast as present evidence the contents of a report from 1996, updated in 1998 and 1999. In those accounts, the IAEA described the history of an Iraqi nuclear weapons program that arms inspectors had systematically destroyed."[55]

Fourth, my investigation found that President Bush and members of his Administration made numerous false statements that Iraq was seeking to acquire aluminum tubes in order to build a uranium centrifuge. Members of the Bush Administration ignored reports and information provided by at least five agencies and foreign intelligence sources, including:

- reports by the Department of Energy which found that the tubes were "too narrow, too heavy, too long – to be of much practical use in a centrifuge." [56]

- the State Department's INR , which "considers it far more likely that the tubes are intended for another purpose." [57]

- the Defense Department which found the tubes "were perfectly usable for rockets." [58]

- British Intelligence which found the tubes would require "substantial re-engineering" to serve as centrifuges.[59]

- The International Atomic Energy Agency which found "all evidence points to that this is for the [conventional] rockets."[60]

- a one-page summary of an NIE personally delivered to President Bush in October 2002 concluding that both the Energy and State Departments believed the aluminum tubes were "intended for conventional weapons."[61]

Statements by the Vice President and Ms. Rice that they knew about Iraq's proposed use of the tubes for centrifuges with "absolute certainty"[62] and that the tubes were "only really suited for nuclear weapons programs"[63] are particularly questionable, since the dispute within the Administration has been described as a "holy war"[64] and Administration sources have stated that Ms. Rice "was aware of the differences of opinion" and that her statements were "just a lie."[65]

Fifth, in making claims such as the President's statement in his State of the Union that "the British government has learned that Saddam Hussein recently sought significant quantities of uranium from Africa,"[66] the Bush Administration ignored numerous, contrary intelligence findings concerning Niger uranium claims, including:

- Ambassador Wilson's conclusion that "no one had signed such a document" concerning the Niger uranium claim.[67]

- the CIA's warning to Ms. Rice directly that "the [Niger] evidence is weak." [68]

- the State Department's finding that the Niger charges were "highly dubious." [69]

- statements by French Intelligence authorities that the Niger story was "Bullsh**" and "doesn't make any sense."[70]

- the conclusion of the National Intelligence Council, delivered to the White House in January 2003, that the Niger uranium claim was unequivocally false.[71]

- The CIA's statement to the President's staff before his October 7, 2002 speech in Cincinnati that the "President should not be a fact witness on this [Niger-Uranium] issue;"[72] and the CIA "rais[ing] several concerns about the fragmentary nature of the intelligence"[73] before his State of the Union speech.

Sixth, we have found that members of the Bush Administration made misleading statements regarding Iraq's chemical weapons capability – such as Mr. Bush' statement in his 2003 State of the Union that "[o]ur intelligence officials estimate that Saddam Hussein had the materials to produce as much as 500 tons of sarin, mustard, and VX nerve agent"[74]-- even though they were aware of contrary intelligence, including:

- the September 2002 DIA report that "[t]here is no reliable information on whether Iraq is producing or stockpiling chemical weapons, or where Iraq has or will establish its chemical warfare agent production facilities."[75]

- as early as 1995 the CIA had been informed that "after the gulf war, Iraq destroyed all its chemical and biological weapons stock."[76]

- the State Department's Bureau of Intelligence and Research flagging many of Secretary Powell's statements regarding chemical weapons as being "weak." [77]

The White House's September 2002 statement that an Iraqi defector, Adnan Ihsan Saeed al-Haeder, had secretly helped bury tons of biological and chemical weapons was also false as the CIA determined by December 2001 that "the intelligence officer concluded that al-Haideri had made up the entire story, apparently in the hopes of securing a visa."[78] Specific statements by the Bush Administration that Iraq possessed mobile chemical weapons laboratories, including the President's statement in his January 28, 2003, State of the Union Address that as a result of information provided by defectors "we know that Iraq, in the late 1990s, had several mobile biological weapons labs . . .designed to produce germ warfare agents and can be moved from place to a place to evade inspectors,"[79] also were misleading. German Intelligence informed the Administration "[t]his [Iraqi source known as "Curveball"] was not substantial evidence . . . [w]e made clear we could not verify the things he said;"[80] British Intelligence officials informed the

CIA they are "not convinced that Curveball is a wholly reliable source;"[81] shortly before Mr. Powell's U.N. speech asserting these claims, the CIA doctor who had met with Curveball noted that he "was deemed a fabricator,"[82] only to be told by his superior that "this war's going to happen regardless of what Curveball said or didn't say;"[83] and as *The Washington Post* recently reported, when CIA officer Tyler Drumheller saw the claim in a draft U.N speech for Mr. Powell Drumheller "took his pen and crossed out the whole paragraph," but he later "turn[ed] on the television and there it was again."[84]

Seventh, we have identified numerous instances where Members of the Bush Administration appear to have acted in a manner designed to manipulate intelligence or otherwise place undue pressure on career intelligence officers to support their case for war. These include:

- Deputy Director of the CIA Richard Kerr's report that analysts at the CIA stated they have been "pushed too hard" regarding linking Iraq to the September 11 attacks and felt "too much pressure."[85]

- a CIA ombudsman who reported unprecedented "hammering" on the Iraq-9/11 linkage issue.[86]

- former CIA Agent Paul Pillar's statement that "[i]ntelligence was misused publicly to justify decisions that had been already made." [87]

- another CIA official stated that when CIA personnel were unable to verify the Niger uranium claims, Vice President Cheney became dissatisfied and it "was the beginning of what turned out to be a year-long tug-of-war between the C.I.A and the Vice-President's office."[88]

- two former CIA officials explained that information on the Niger uranium charge was "passed directly to Washington without vetting them in the [U.S.] Embassy"[89] in Rome.

- An intelligence analyst who testified, "[t]here's so much pressure [to support the Administration's position on aluminum tubes], you know, they keep telling us, go back and find the right answer."[90]

- a senior official reported that CIA analysts got "pounded on, day after day" [91]on WMD issues.

- a CIA official stated, "[t]here was a great deal of pressure to find a reason to go to war with Iraq. And the pressure was not just subtle; it was blatant . . . [the official's boss] called a meeting and gave them their marching orders. And he said, "You know what? If Bush wants to go to war, it's your job to give him a reason to do so." [92]

- Greg Thielmann, a director at the State Department's Intelligence Bureau, described "systematic, across-the-board exaggeration" of intelligence by the White House as it made its case that Saddam Hussein posed an imminent threat to the U.S."[93]

- The Vice President and Scooter Libby made numerous visits to the CIA's Langley, Virginia headquarters to not only question, but, according to *The Washington Post* create an atmosphere in which "analysts felt they were being pressured to make their assessments fit with the Bush administration's policy objectives [and] … 'sent signals … that a certain output was desired from here,' one senior agency official said." [94]

All of the above findings are based not on theory or conjecture, but on actual statements, accounts, testimony and admissions, each of which is quoted, sourced, and footnoted. Not a single one of these findings are impacted by the "new" intelligence study recently released by the Bush Administration showing that they have found old canisters of degraded gas dating from before the first Gulf War. In reality, such politically convenient disclosures are more a sign of desperation by the Administration than tangible evidence altering the findings of the Kay Report that "there were not large stockpiles of newly produced weapons of mass destruction,"[95] or rebutting numerous examples of false and misleading statements and manipulation concerning links between Iraq and al Qaeda, aluminum tubes, uranium from Niger, nuclear weapons, and mobile chemical weapon labs identified in my investigation.

Encouraging and Countenancing Torture and Cruel, Inhuman, and Degrading Treatment

I also found that several individuals within the Bush Administration may have violated a number of domestic laws and international treaty obligations concerning the mistreatment of detainees in Iraq. Then Attorney General Ashcroft and former White House Counsel Gonzales appear responsible for unlawful removal of detainees from Iraq in contravention of the War Crimes Act.[96] They requested and approved a March 19, 2004 legal memorandum, which, according to intelligence officials, "was a green light"[97] for the CIA to improperly remove detainees from Iraq. Also, both Secretary Rumsfeld and then CIA Director Tenet were both aware of and approved the "ghosting" of at least one, and potentially further detainees, in apparent violation of the Geneva Conventions[98] With regard to the detaineee Hiwa Abdul Rahman Rashul, Secretary Rumsfeld admitted that Mr. Tenet asked him "not to immediately register the individual"[99] (who was not registered for several additional months).

Mr. Ashcroft is also responsible for approving a legal memorandum defining torture as being limited to acts consisting of "extreme acts" inflicting "severe pain," such as that accompanying "death or organ failure,"[100] in apparent contravention of the Anti-Torture Statute;[101] while Mr. Gonzales is responsible for adopting a legal position that the ban on cruel, inhuman, and degrading treatment did not apply to detainees held outside of the United States, in apparent violation of the Convention Against Torture, Cruel, Inhuman and Degrading Treatment.[102] Secretary Rumsfeld also appears to bear responsibility for certain torture and other illegal conduct in violation of the Anti-Torture Statute since he approved a November 27, 2002 memorandum which includes the "use of scenarios designed to convince the detainee that death or severely painful consequences for him and/or his family are imminent."[103]

Political Retaliation

Special Prosecutor Fitzgerald's apparent election not to pursue criminal charges against Karl Rove for his role in the outing of Valerie Plame should also not be understood to exonerate

his or the Administration's misconduct in this matter. The record clearly shows that several members of the Bush Administration, including Karl Rove and Scooter Libby, improperly disseminated Valerie Plame's name and status as a covert CIA agent to the press in violation of administrative legal requirements. The Libby Indictment and related media accounts – including the recent admission by Robert Novak -- document that at least four administration officials (including Mr. Libby and Mr. Rove) called at least five Washington journalists (Judith Miller, Robert Novak, Matthew Cooper, Walter Pincus, and Bob Woodward) and leaked the identity and occupation of Wilson's wife as a CIA operative.

These disclosures do not appear to have been inadvertent, rather they were, according to relevant reporters "given to me;" "unsolicited;" and obtained when the Administration official "veered"[104] off topic. There appears little doubt that leaks by Mr. Rove and Mr. Libby violated the requirements of their non-disclosure obligations, namely Executive Order 12958 concerning the protection of national security secrets. This Order applies not only to negligent disclosure of classified information but also to persons simply "confirming"[105] information to the media. Under the Executive Order, the President – about whom Robert Novak now claims he would "be amazed"[106] if he did not know the leaker's identity – has an affirmative obligation to take "appropriate and prompt corrective action."[107] (As *Newsweek* explained: "[a]ny reasonable reading of the events covered in the indictment would consider Rove's behavior 'reckless' [under the EO]."[108])

We now also know that a key motivation for disclosure of Ms. Plame's name was to obtain retribution against Ambassador Wilson. Among other things, the White House strategy concerning Mr. Wilson was to "slime and defend;"[109] Karl Rove declared Mr. Wilson's wife "is fair game;"[110] a former Administration official acknowledged they "were trying to not only undermine and trash Ambassador Wilson, but to demonstrate their contempt for CIA by bringing Valerie's name into it;"[111] and Special Prosecutor Fitzgerald described a "concerted action" by "multiple people in the White House" using classified information to "discredit, punish, or seek revenge"[112] against Ambassador Wilson, and the Special Prosecutor released a copy of a hand written note by the Vice President specifically questioning the Ambassador's actions.[113]

Even though Mr. Rove had previously advised Mr. Aschcroft as a political candidate (earning almost $750,000 for his services) and was considered by many to be responsible for Mr. Ashcroft being named as Attorney General, we now know the Attorney General was personally and privately briefed on FBI interviews a full two months after he was informed that both Libby and Rove were "trying to mislead the FBI to conceal their roles in the leak, according to government records and interviews."[114] Such action by the Attorney General is inconsistent with applicable conflict of interest requirements, which ordinarily would require immediate recusal under such circumstances.[115] It also raises questions regarding the one-month delay between the time the CIA contacted the Department of Justice regarding possible criminal misconduct and the time the Department initiated a criminal investigation;[116] the Department's subsequent delay in notifying the White House Counsel;[117] and the White House Counsel's delay in asking White House staff to preserve relevant evidence in the investigation.[118]

I also found the retribution against Ms. Plame was not an isolated occurrence. The record shows the Bush Administration engaged in a pattern of exacting retribution against individuals,

both inside and outside of the Administration, who exposed wrongdoing or otherwise criticized the Administration's actions with regard to the Iraq War. This includes:

- demoting Bunnatine Greenhouse as the Chief Contracting Officer of the Army Corps of Engineers in apparent retribution for her testimony before Congress that undue favoritism was shown toward Halliburton in awarding contracts in Iraq.[119]

- "publicly humiliate[ing General Eric Shiseki] for suggesting it would take hundreds of thousands of troops to secure a post-Saddam Iraq"[120] by leaking the name of his replacement 14 months before his retirement, rendering him a lame duck and, according to media accounts, "embarrassing and neutralizing the Army's top officer."[121]

- outing ABC reporter Jeffrey Kofman for reporting on frustrated troops in Iraq; with Matt Drudge reporting that Mr. Kofman was gay and admitting "someone from the White House communications shop"[122] had given him the information.

- transferring and "read[ing] the riot act" to CIA employee named "Jerry" who found that the discredited Iraqi informer Curveball was providing false information regarding Iraq's mobile chemical weapons capability.[123]

- demoting and stripping Samuel J. Provance, an Army intelligence officer, of his clearance after he "made clear to [his] superiors that [he] was troubled about what had happened [at Abu Ghraib]."[124]

Warrantless Domestic Spying

I further found that the warrantless surveillance programs disclosed by *The New York Times* and *USA Today* violate a number of federal laws, and members of the Administration made numerous misleading statements regarding these matters. The warrantless wiretap program disclosed by *The New York Times* violates FISA, the Federal Wiretap Act, and the warrant requirement of the Fourth Amendment. With regard to the warrantless wiretapping program, then Senate Majority Leader Tom Daschle directly contradicted the Administration's argument that the Authorization of Use of Military Force resolution was intended by Congress to statutorily authorize domestic surveillance, since he explained the Senate rejected a "last-minute change [from the White House that] would have given the president broad authority to exercise expansive powers … in the United States, potentially against American citizens;"[125] and the Attorney General acknowledged that Congressional leaders told him it would be "difficult, if not impossible"[126] to obtain Congressional approval for warrantless domestic surveillance. The Bush Administration's argument that the *Hamdi* case (involving the detention of enemy combatants) supports their expansive view of the AUMF is also not credible; as Professor Laurence Tribe observed, the Americans covered by the NSA program "are not even *alleged* to be enemies, much less *enemy combatants*."[127]

The Administration's assertion that it nonetheless has inherent constitutional authority to engage in domestic spying pursuant to the *Youngstown Steel Seizure* case is contradicted by the House-Senate Conference Report regarding FISA, which stated it is "[t]he intent of the conferees

is to apply the standard set forth in the *Steel Seizure* case: 'When a President takes measures incompatible with the express or implied will of Congress, his power is at the lowest ebb."[128] With regard to the Bush Administration's contention that a passage in the *In re Sealed Case* supports their inherent authority to conduct domestic warrantless surveillance, the Congressional Research Service disagreed, writing, "[i]n the wake of FISA's passage, the Court of Review's reliance [in the *In re Sealed Case*] on these pre-FISA cases ... as a basis for its assumption of the continued vitality of the President's inherent authority ... might be viewed as somewhat undercutting the persuasive force of the Court of Review's statement."[129] In terms of the Fourth Amendment, the Department of Justice's assertion that warrantless wiretapping should be considered "reasonable" pursuant to the "special needs" exception to the Amendment's warrant requirement is contradicted by the overwhelming weight of case law, summarized in a letter signed by Reagan FBI Director William Sessions that "the NSA spying program has *none* of the safeguards found critical to upholding 'special needs' searches in other contexts."[130] Any vestige of credibility to the "inherent authority" argument appears to have been shot down by the recent decision in *Hamdman*, where the Court explicitly stated, "[w]hether or not the President had independent power, absent congressional authorization, to convene military commissions, he may not disregard limitations that Congress has, in proper exercise of its own war powers, placed on his powers."[131]

The NSA's domestic database program appears to violate both the Stored Communications Act, which prohibits the knowing disclosure of customer telephone records to the government, and the Communications Act, which prohibits the disclosure of telephone records to third parties; as the non-partisan Congressional Research Service wrote, the actions by the telecommunications companies may "expose the telephone companies to ... civil remedies or criminal sanctions."[132] If the information was obtained on a "real time basis," as some government sources have indicated,[133] it would also likely constitute a criminal violation of the Pen Register and Trap and Trace Statute, with the Center on Democracy and Technology finding, that the NSA would be "required to obtain an order from the FISA court."[134]

With regard to the National Security Act, that law clearly specifies that the President is required to keep all Members of the House and Senate Intelligence Committees "fully and currently informed"[135] of all intelligence activities except in the case of a highly classified covert action. Based on their review, the Congressional Research Service concluded, "the NSA surveillance program would appear to fall more closely under the definition of an intelligence collection program, rather than qualify as a covert action program as defined by statute."[136]

At the same time the domestic spying programs have intruded on the civil liberties of millions of Americans, there is little evidence they have provided any appreciable intelligence or law enforcement benefit, and may have jeopardized terrorism prosecutions. Government officials "have dismissed nearly all of [the NSA call leads] as potential suspects after hearing nothing pertinent to a terrorist threat,"[137] stating that "[t]he information was so thin, and the connections were so remote, that they never led to anything,"[138] with FBI agents "jok[ing] that a new bunch of tips meant more calls to the Pizza Hut."[139] FISA judges have testified that "the [warrantless wiretapping] program could imperil criminal prosecutions that grew out of the wiretaps."[140] With regard to the domestic database program, an Administration official "questioned whether the fruits of the NSA [database] program … have been worth the cost to

privacy; while a Pentagon consultant admitted, "[t]he vast majority of what we did with the [NSA] intelligence was ill-focused and not productive."[141]

President Bush and other high-ranking members of his Administration have made a number of misleading statements concerning the NSA programs to Congress and the public:

- With respect to the issue of whether the government engaged in domestic warrantless wiretapping prior to the disclosure by *The New York Times*, President Bush declared that "any time you hear the United States Government talking about wiretap, it requires ...a court order;"[142] Attorney General Gonzales testified "it's not the policy or the agenda of this President to authorize actions that would be in contravention of our criminal statutes;"[143] and then Associate Attorney General David Kris previously testified that "both before and after the PATRIOT Act, FISA can be used only against foreign powers and their agents;"[144]

- With respect to the Bush Administration's claims that no domestic communications were intercepted under the warrantless wiretapping program, government officials have acknowledged that the eavesdropping program "has captured what are purely domestic communications;"[145] and the *Washington Times* reported that government sources stated, "the National Security Agency in cooperation with the FBI was allowed to monitor [without warrants] the telephone calls and e-mails of any American believed to be in contact with a person abroad suspected of being linked to al Qaeda or other terrorist groups."[146]

- With respect to the Administration's assertions that the government was not monitoring calls or, in President Bush's words "trolling through the personal lives of millions of innocent Americans,"[147] in addition to the *USA Today* revelation of the existence of the NSA telephone database, *The New York Times* previously reported telecommunications companies "have been storing information on calling patterns and giving it to the federal government;"[148] former AT&T employee Mark Klein has stated the NSA set up "secret room"[149] in AT&T's offices capable of sweeping in telephone and Internet communications;[150] and the GAO found that in total, the Bush Administration was engaged in "199 data mining efforts … [of which] 122 used personal information."[151]

- With respect to members of the Bush Administration, such as White House Counselor Dan Bartlett, stating that lawmakers who have been briefed on the NSA programs "believed we are doing the right thing,"[152] several Members of Congress did raise legal concerns, including the Ranking Democrat on the Senate Intelligence Committee, Senator Rockefeller who handwrote a letter to Vice President Cheney, stating, "[c]learly, the activities we discussed raise profound oversight issues;"[153] former Senator Democratic Leader Tom Daschle who stated that the White House "omitted key details about the surveillance programs related to the war on terrorism during classified briefings with lawmakers;"[154] and House Minority Leader Pelosi who declared "she hadn't been told all of the information included in the *USA Today* story."[155]

None of us in any way oppose surveillance of Americans who are believed to be associated with Al Qaeda or other terrorist groups, all we ask is that in doing so the Administration comply with the law of the land, and if additional resources are needed to

comply, they should ask for them. However, it is unacceptable for any Administration to unilaterally and unlawfully place itself in the position of judge and jury in making those decisions or to mislead Congress, the Courts, and the American people once these decisions are made. I understand and appreciate the need for confidentiality and classification of sensitive programs, but this should never be used as an excuse to exclude appropriate members of Congress from performing their statutory and constitutional oversight roles.

The Death of Accountability

In the wake of the death of more than 2,500 brave American soldiers and the wounding of more than 18,000 soldiers, the killing of tens of thousands of innocent Iraqis, the expenditure of trillions of dollars in taxpayer funds in a foreign land, the intrusion on the civil liberties of millions of Americans with no apparent law enforcement benefit, it is particularly unsettling that the Majority Party has not had the good sense to ask how we got here, let alone chart a viable course for the future. As David Broder wrote, "Majority Republicans see themselves first and foremost as members of the Bush team – and do not want to make trouble by asking hard questions."[156]

Thus, the Senate and House Intelligence Committees have refused to conduct any serious investigation concerning intelligence manipulation relating to the Iraq War; House Republican Chairmen have rejected numerous requests by Members to conduct hearings on torture and other abuses in Iraq; and the Administration has ignored requests for information concerning such abuses submitted by the Ranking Members of six committees. Republicans in the House have also rejected myriad attempts by Members to ask the Administration to provide information regarding all of these matters pursuant to Resolutions of Inquiry.

With regard to domestic spying, the Bush Administration rejected without explanation Democratic requests for a special counsel or other independent review of the allegations of possible criminal misconduct concerning the NSA programs. Two weeks ago, we learned that President Bush himself blocked an ethics investigation by the Justice Department into possible wrongdoing associated with the NSA's warrantless surveillance program.[157] The Administration also stymied any meaningful attempt at congressional oversight, with Senate Judiciary Chairman Specter complaining, "[t]hey want to do just as they please, for as long as they can get away with it."[158] Moreover, House Republican leaders rejected repeated Democratic proposals to create an independent panel or commission to review the NSA program, while Republican Committee Chairmen stymied Democratic efforts to pursue Resolutions of Inquiry directing the Bush Administration to respond to congressional questions. When the Senate Intelligence Committee fell in line behind the Administration in rejecting an investigation, the Ranking Democrat, John Rockefeller declared, "[t]he committee is, to put it bluntly, basically under the control of the White House."[159] The Administration has also pursued various changes to FOIA and classification laws,[160] and repeatedly invoked the states secret doctrine in an effort to insulate their conduct from outside or court scrutiny.[161]

It is for these reasons that our Report rejects the frequent contention by the Bush Administration that their conduct has been reviewed and they have been exonerated. No entity has ever considered whether the Administration misled Americans about the decision to go to

war, while the presidentially appointed Silberman-Robb Commission Report specifically cautioned that intelligence manipulation "was not part of our inquiry." There has also not been any independent inquiry concerning torture and other legal violations in Iraq; nor has there been an independent review of the pattern of cover-ups and political retribution by the Bush Administration against its critics -- other than the very narrow and still ongoing inquiry of Special Counsel Fitzgerald into the outing of Valerie Plame – or the Administration's warrantless domestic spying programs.

Conclusion

My Report has found that the last six years under the presidency of George W. Bush and the GOP-controlled Congress have brought about the constitutionally dangerous circumstances of not only abuse of power, but also unchecked abuse of power.

Unlike scandals such as Watergate and Iran-Contra, where Congress was able to investigate and respond to misconduct, the current Majority Party has shown little inclination to engage in basic oversight, let alone challenge the Administration directly. The courts, while operating as a partial check as the *Hamdan* case has shown, are slow to act and frequently unable to delve into many of the controversies presented due to limitations on standing, ripeness, and other procedural defenses asserted by the Administration. At the same time, unlike previous threats to civil liberties posed by the Civil War (suspension of habeas corpus and eviction of Jews from portions of the Southern States); World War I (anti-immigrant "Palmer Raids"); World War II (internment of Japanese Americans); and, the Vietnam War (COINTELPRO); the risks to our citizens' rights today are potentially more grave, as the war on terror has no specific end point.

It is clear to me that our constitutional protections are very precarious in the present day and age. While the Bush Administration continues to believe that our Nation operates best when a few people make decisions in secret, outside the purview of the Courts or Congress, Justice Breyer reminded us in *Hamdam* that "judicial insistence upon [consultation with Congress] does not weaken our Nation's ability to deal with danger. To the contrary, that insistence strengthens the Nation's ability to determine – through democratic means – how best to do so."[162] While the Administration and its allies operate as if the media needs to be reined in and intimidated, history has shown that the more free our press is, the more vibrant our democracy will be. Perhaps most importantly, while the Bush Administration has warned that "Americans need to be watch what they say"[163] and charged that those who question their actions are "giving ammunition to America's enemies," [164] Martin Luther King, Jr. warned us "there comes a time when silence is betrayal." [165] In my judgment, that time has come.

To me, the lesson of the constitutional crisis we find ourselves in today is that if we allow intelligence, military and law enforcement to do their work free of political interference, if we give them requisite resources and modern technologies, if we allow them to "connect the dots" in a straight forward and non-partisan manner, if we fairly exercise our oversight responsibilities, we can protect our citizens and defeat our enemies. We all want to fight terrorism, but we need

to fight it the right way, consistent with our Constitution, and in a manner that serves as a model for the rest of the world.

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[3] Richard A. Clarke, Against All Enemies: Inside America's War on Terrorism 32 (Free Press, 2004).

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[6] George Packer, The Assassins' Gate 45 (Farrar, Straus, and Giroux, 2005).

[7] Daniel Eisenberg, "We're Taking Him Out," *Time*, May 13, 2002, at 36.

[8]Glenn Kessler, "U.S. Decision on Iraq Has Puzzling Past," *The Washington Post*, Jan. 12, 2003, at A1.

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[11] Memorandum from David Manning, U.K. Foreign Policy Advisor, to the Prime Minister (Mar. 14, 2002), *available at* http://downingstreetmemo.com/docs/manning.pdf.

[12] Memorandum from Jack Straw, U.K. Foreign Secretary, to the Prime Minister (Mar. 25, 2002), *available at* http://downingstreetmemo.com/docs/straw.pdf.

[13] Memorandum from Matthew Rycroft to David Manning, U.K. Foreign Policy Advisor (July 23, 2002), at 1, *available at* http://www.timesonline.co.uk/article/0,2087-1593607,00.html.

[14] Memorandum from Matthew Rycroft to David Manning, U.K. Foreign Policy Advisor (July 23, 2002), at 1, *available at* http://www.timesonline.co.uk/article/02087-1593607,00.html.

[15] Sam Tanenhaus, "Bush's Brain Trust," *Vanity Fair*, July 2003, at 114.

[16] Barton Gellman and Walter Pincus, "Depiction of Threat Outgrew Supporting Evidence," *The Washington Post*, August 10, 2003, at A1.

[17] Bob Woodward, Plan of Attack 286 (Simon & Schuster, 2004).

[18] We found evidence of a number of "official" leaks by members of the Bush Administration in the run up to war, including leaking classified information to both *The Washington Times* and *The New York Times* concerning Iraq's acquisition of aluminum tubes. See Michael R. Gordon & Judith Miller, "U.S. Says Hussein Intensifies Quest for A-Bomb Parts," *The New York Times*, Sept. 8, 2002, at 1.6; Bill Gertz, "Iraq seeks steel used to make nukes; Fails so far to buy equipment," *The Washington Times*, July 26, 2002, at A1. This pattern continued subsequent to the invasion of Iraq with the outing of Valerie Plame pursuant to Robert Novak's column on July 14, 2003; and President Bush's authorization in 2003 that Scooter Libby disclose aspects of a classified NIE to Judith Miller. See Robert Novak, "Mission to Niger," *The Chicago Sun-Times*, July 14, 2003, at 31; Josh Gersten, "Bush Authorized Leak to Times, Libby Told Grand Jury," *New York Sun*, April 6, 2006.

[19] President George W. Bush, Remarks at the U.N. General Assembly (Sept. 12, 2002).

[20] Barton Gellman, "A Leak, Then a Cascade; Did a Bush Loyalist Overstep the Bounds in Protecting the Administration's Case for War in Iraq and Obstruct an Investigation?" *The Washington Post*, Oct. 30, 2005, at A1.

[21] Barton Gellman & Walter Pincus, "Depiction of Threat Outgrew Supporting Evidence," *The Washington Post*, Aug. 10, 2003, at A1.

[22] Among other things, the National Intelligence Council specifically warned President Bush in January 2003 that "the conflict could spark factional violence and an anti-U.S. insurgency . . . [o]ne of the reports said the U.S.-led occupation could 'increase popular sympathy for terrorist objectives;'" and a classified State Department report concluded that it was unlikely that installing a new government in Iraq would encourage the spread of democracy in the region. See Bryan Burrough, Evgenia Peretz, David Rose & David Wise, "The Path to War," *Vanity Fair*, May 20, 2004, at 228; David Corn, The Lies of George W. Bush 240 note (Random House, 2004).

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[26] Bob Woodward, Plan of Attack 253 (Simon & Schuster, 2004).

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[100] Memorandum for Alberto R. Gonzales, Counsel for President, Re: Standards of Conduct for Interrogation under 18 U.S.C. § 2340-2340A, August 1, 2002.

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[102] Convention against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Dec. 10, 1984, 1465 U.N.T.S.(entered into force June 26, 1987). The United States ratified the CAT on October 21, 1994. When the Senate ratified this treaty it clarified "[t]hat the

United States considers itself bound by the obligation under article 16 to prevent `cruel, inhuman or degrading treatment or punishment', only insofar as the term `cruel, inhuman or degrading treatment or punishment' means the cruel, unusual and inhumane treatment or punishment prohibited by the Fifth, Eighth, and/or Fourteenth Amendments to the Constitution of the United States." S. DOC. NO. 101-30, Convention Against Torture and Other Cruel, Inhuman or Degrading Treatment or Punishment, Aug. 30, 1990, at 25-26.

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[114] Murray Waas, "Ashcroft's Briefings," *The National Journal*, June 10th, 2006, at 32.

[115]28 U.S.C. § 528 requires the Attorney General to promulgate rules mandating the disqualification of any officer or employee of the Justice Department "from participation in a particular investigation or prosecution if such participation may result in a personal, financial, or political conflict of interest, or the appearance thereof." Pursuant to this requirement, the Department has promulgated regulations stating that "no employee shall participate in a criminal investigation or prosecution if he has a personal or political relationship with: (1) any person . . .

substantially involved in the conduct that is the subject of the investigation or prosecution; or (2) any person . . . which he knows or has a specific and substantial interest that would be affected by the outcome of the investigation or prosecution. 28 C.F.R. § 452. Similar requirements are included in the U.S. Attorney's Manual and various rules of professional conduct.

[116] After Robert Novak first disclosed Valerie Plame's name and status as a CIA covert agent on July 14, 2003, the CIA contacted the Justice Department four times over three weeks to request a criminal investigation. It was only on September 23, 2003, over one month after the first CIA notification, that the Department finally indicated they would investigate the leak. See Letter from Stanley M. Moskowitz, Director of Congressional Affairs, CIA, to the Honorable John Conyers, Jr., Ranking Member, House Judiciary Committee (Jan. 30, 2004).

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[132] Elizabeth B. Bazan, Gina Marie Stevens, and Brian T. Yeh, "Government Access to Phone Calling Activity and Related Records: Legal Authorities," CRS Report for Congress, May 17th, 2006.

[133] Seymour Hersh, " The Talk of the Town: National Security Department: Listening In," *The New Yorker,* May 29, 2006 at 24. Former government officials told Hersh, "[t]his is not about getting a cardboard box of monthly phone bills in alphabetical order… the N.S.A. is getting real-time actionable intelligence."

[134] Kate Martin, NSA Again Violates the Law (May 11,2006) *available at* http://www.acsblog.org/bill-of-rights-2835-guest-blogger-nsa-again-violates-the-law.html.

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[159] David Kirkpatrick & Scott Shane, "G.O.P. Senators Say Accord is Set on Wiretapping," *The New York Times*, March 8, 2006, at A1.

[160] The Bush Administration significantly narrowed the scope of the FOIA by providing that agencies are entitled to the government's full legal support for withholding information from the public. Memorandum from John Ashcroft, Attorney General, to Heads of all Federal Departments and Agencies (Oct 12. 2005).

[161] The state secrets doctrine was used by the Administration to block Sibel Edmonds, a FBI translator, from seeking redress as an intelligence whistleblower; to limit information concerning the case of Maher Arar, a Canadian citizen sent to Syria where he was tortured; to seek dismissal of suits challenging the NSA's wiretapping program brought against AT&T; two suits challenging the legality of the NSA's warrantless wiretap program brought by the ACLU and the Center for Constitutional Rights; 20 lawsuits brought against telephone companies alleging that they had improperly provided customer call data to the NSA; and a lawsuit alleging that the CIA had wrongfully imprisoned a German citizen.

[162] Hamdam v. Rumsfeld, 2006 WL 1764793, at *40 (S. Ct. Jun. 29, 2006) (Breyer, J. concurring).

[163] Press Briefing by Ari Fleisher (Oct 1, 2001).

[164]Ashcroft: Critics of new terror measures under mine effort, *CNN.com*, December 7, 2001.

[165] Martin Luther King, Jr., Address at a meeting of Clergy and Laity Concerned at Riverside Church in New York City, April 4, 1967.